

**STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD**

IN RE:)	DOCKET NOS. SPU-02-11, SPU-02-13
)	
APPEALS OF)	MOTION TO RECONSIDER
SPRINT COMMUNICATIONS)	GRANTING OF INTERVENTIONS
COMPANY L.P. and LEVEL 3)	OR, ALTERNATIVELY,
COMMUNICATIONS L.L.C.)	MOTION FOR CLARIFICATION

On July 9 and July 17, 2002, Sprint Communications Company L.P. (“Sprint”) and Level 3 Communications L.L.C. (“Level 3”), respectively, filed with this Board appeals of decisions of the North American Numbering Plan Administrator (“NANPA”). NANPA had denied requests for NXX codes to both Sprint and Level 3 because they did not have CLEC certificates per se issued by the Board. Level 3 asserted various errors of law and fact, including but not limited to the denial amounting to a barrier to entry, the denial violating the FCC mandate that lack of access to number resources should not bar any service provider from providing services, the arbitrary nature of NANPA’s denial when it approves numbers for precisely the same use in numerous other states, and the fact that, as the Board noted in Intrado, certain service providers do not need CLEC certificates yet remain entitled to certain basic resources required to provide their services. Level 3’s appeal noted that it was seeking to provide “direct inward dial services that allow for local connectivity to Level 3’s Internet Service Provider (“ISP”) customers.” See Petition at ¶ 1. Beyond that Level 3 did not address, much less commit to, any particular business plan or technical method of providing the service to ISPs. Indeed, both Sprint and Level 3 noted in their appeals that they have worked with Board Staff on a variety of possible alternative approaches to provide services to ISPs.

Level 3 asserts in its appeal that NANPA reads too narrowly the nature of the authority an applicant must demonstrate when it requires a CLEC certificate *per se*. Level 3 believes that this proceeding, particularly with the addition of Iowa Telecom and its alleged issues, has strayed far from its original purpose. Because all parties that have intervened have taken the opportunity to submit testimony on matters beyond the scope of Level 3's appeal, Level 3 seeks to establish reasonable boundaries for the proceeding at hand, and respectfully requests that the Board do so promptly so that Level 3 can timely address its reply testimony, due October 31, to the actual issues that caused this case to be brought.

The History of the Unwarranted Expansion of this Matter

Initially, the Office of Consumer Advocate ("OCA") sought to intervene. In doing so, the OCA did not necessarily oppose reversing NANPA, but rather wanted to ensure that any such action was taken with care to best preserve numbering resources in Iowa. The Board agreed, per OCA's request, to have the appellants address their efforts at various alternative approaches, and to compare their preferred or contemplated approach(es) with a particular approach litigated in Maine concerning the use of "virtual NXXs" ("VNXX").

While Level 3 was concerned about the expanding scope of the proceeding, Level 3 did respond to the Board's request to address the applicability of the Brooks Fiber decisions by the Maine PUC.¹ (Hereafter the "Maine Orders") Through the testimony of William Hunt, Level 3 explained that the Maine Orders were not necessarily applicable in the present case. Among other distinctions between the two proceedings, in Maine a specific approach to providing

¹ See Maine PUC docket 98-758, cited in the Board's August 19, 2002 "Order Docketing Appeals."

service was being litigated; whereas here, the question is whether Level 3 has proper authority to access numbering resources.

Level 3's concerns about the expansion of the scope of the proceeding have grown significantly as this case has progressed. First, while Level 3 had no issue with OCA's intervention, OCA's testimony (while supportive of Level 3's right to entry) went beyond the scope of the proceeding brought by the appellants. OCA Witness Susan Baldwin, for example, states that "the Board will likely need to delve into the costs and pricing for the transport associated with VNXX service." See Baldwin at p. 3 ln. 6-7. On Page 15, Ms. Baldwin states that what products and services the ILECs offer is a relevant consideration; on page 31, Ms. Baldwin asks the Board to look at the appellants' business plans.

Qwest also sought intervention. As the testimony of Qwest witness Larry Brotherson makes clear, Qwest is not addressing the ways in which NANPA applied the law to Level 3's application. Rather, Qwest is attempting to determine the jurisdictional nature of calls made using VNXX. See, e.g., Brotherson at i (Executive Summary, second paragraph). Qwest also asks the Board to determine the precise products Level 3 would have to purchase from Qwest. See Brotherson at ii (Executive Summary, third paragraph)("The Board should also require Appellants to order LIS facilities to those offices in the rate center where the NXX numbers are sought"). Qwest seeks to convert this proceeding from an appeal of denial of numbering resources to a generic proceeding dealing with intercarrier compensation, interconnection obligations, virtual NXX and FX services, and rate setting. See Brotherson at 11-17.

Finally, Iowa Telecom has now filed a late petition to intervene. Iowa Telecom seeks to expand the matter further by arguing about the applicability of number portability and whether,

if, or how LNP applies to Iowa Telecom, and what the economic impact of an INP or LNP solution might be on Iowa Telecom. See, e.g., Iowa Telecom Petition at ¶ 9; Testimony of Larsen at 6.

Level 3's Objections to Qwest's and Iowa Telecom's Interventions and Concerns About the Scope of the Proceeding

Level 3 vigorously objects to the continued expansion of this matter, and requests that the Board clarify that this matter is limited to those issues presented by Level 3 and Sprint in their appeals.

It is critical that the scope of the proceeding not be allowed to include a vast array of tangentially related issues that are more appropriately handled in a generic proceeding. If the Board allows this to happen it only increases the barrier to entry that has already been erected to Level 3's rightful entry to the Iowa telecommunications market. It is also necessary that Level 3 know the appropriate scope of the proceeding promptly so that it may prepare effective yet relevant rebuttal testimony by the October 31 deadline. It is a basic principle of appellate procedure that the appeal is limited in scope to the issues addressed below. See, e.g., Ahrendsen v. Iowa Dep't of Human Servs., 613 N.W.2d 674, 676 (Iowa 2000). The task before NANPA was to determine if (a) Level 3 had authority to provide service in the geographic areas where numbers were requested; and (b) whether Level 3 could place the requested numbers into service within the required timeframe. In this analysis NANPA was bound by Constitutional principles, the overriding statutory principles of the Telecommunications Act, and standard administrative principles such as capriciousness. In its application to NANPA, and again in its appeal in this docket, Level 3 did not address its business plan and does not believe that to be a relevant inquiry to the issues at hand. NANPA does not, generally or in this case, look at the business

plan or proposed technical architecture of the applicant – that is not part of the criteria NANPA is charged with applying.

It is clear that issues such as the jurisdictional nature of VNXX calls, whether so-called “DLECs” should ever be allowed in Iowa, the interpretation of paragraphs in an interconnection agreement, intercarrier compensation, and eligibility for waivers from number portability mandates are all well beyond both the scope of Level 3's appeal and the decision made by NANPA that forms the basis for Level 3's appeal. To allow the proceeding to continue to expand as this has denies the Appellants a just determination of their own case². Such an expansion of the scope of this proceeding violates black-letter principles of appellate procedure, and it creates needless and prejudicial delays and costly complications all of which work to the disadvantage of the new entrant trying to compete and serve to protect the incumbents from innovative competition. Moreover, the interveners efforts to complicate this proceeding are based on speculation. Sprint and Level 3 have been forthright in working with Board staff on alternatives that would allow their competitive entry into the Iowa market, not all of which were VNXX-related. See attached copy of Level 3's response to OCA's Data Request 4. All extraneous issues raised by other parties are premature until Level 3 determines how its network will be engineered and do not account for the fact that Sprint and Level 3 already have agreed to terms of interconnection with Qwest.

² This is particularly a concern under the Board's present cost-allocation regime. A plaintiff, complainant, or appellant before the Board should have some ability through the construction of its initial pleading to reasonably control its exposure to the cost allocation process. Giving other parties the ability to expand the proceeding absent compelling circumstances is, essentially, allowing competitors to spend the plaintiff's money.

The pragmatic problem in the Board allowing such wholly speculative distortions of the original, narrow appeal is that there is not (and cannot be) a record on which the Board can base a decision. There will not be a record as to any of these issues unless and until Level 3 can obtain numbering resources and begin to engineer a network and develop service offerings.

Because the Qwest and Iowa Telecom petitions for intervention do not in any way address the issues that were actually before NANPA, and instead discuss only issues such as compensation or the status of INP and LNP, their interventions should be reconsidered and denied.

Whether or not the Board denies these interventions, it should clarify that the proceeding is not about VNXX/FX . It is not about compensation or interconnection. It is not preemptive litigation of the principle of relative use. This case is simply about NANPA's denial of numbering resources to a carrier that has all the authority it needs to provide service in Iowa, a denial that is arbitrary and creates an unlawful barrier to entry. Those are the only issues Level 3 should have to address in its October 31, 2002, reply testimony. Level 3 respectfully requests an order to that effect.

Respectfully submitted this 23rd day of October, 2002.

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ATTORNEYS FOR LEVEL 3 COMMUNICATIONS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the document attached to this Certificate was hand delivered or mailed via U.S. Mail to the persons listed below at the addresses indicated, on the 23rd day of October, 2002.

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